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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 103

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR TRUCK DRIVERS LOCAL UNION NO. 449

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BRIEF FOR TRUCK DRIVERS LOCAL UNION NO. 449

Opinions Below

The opinion of the Court below (R. 42-55) is reported at 231 F. 2d 110. The findings of fact, conclusions of law, and order of the Board (R. 34-37) are reported at 109 NLRB 447.

Jurisdiction

The decree of the Court below (R. 61) was entered on March 13, 1956. The petition for a writ of certiorari was filed on May 23, 1956, and granted on October 8, 1956 (R. 62) 352 U. S. 818. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

Statutes Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*) appear in Appendix A, *infra.*

The Question Presented

Where a corporation lays off its truck driver employees solely because the fellow union members of its employees are on strike at another corporation, is the non-struck corporation excused for its violation of Section 8(a)(1) and (3) of the National Labor Relations Act solely because it has bargained jointly in the past with the struck corporation?

Statement

A. Findings of Fact

This case was tried on an agreed state of facts established either by admissions in the answer to the complaint of the General Counsel or by stipulation (R. 16-20).

Linen and Credit Exchange is an unincorporated association composed of eight corporations located in the cities of Buffalo, Niagara Falls and Dunkirk, New York, which are engaged in furnishing, supplying, and servicing industrial and commercial enterprises with cotton and

linen towels, uniforms and related items.[1] The Exchange and seven of the corporations were named as respondents in the action before the Board. The eight corporations have been members of the Exchange for some 13 years during which time each of the members of the Exchange recognized Local 449 as the exclusive bargaining representative of their respective employees, employed as truck drivers (R. 17-18).

Negotiations of the terms of the collective bargaining agreements were worked out by representatives of the Exchange and Local 449 and then submitted to the membership of the Exchange and Local 449 for majority approval. When majority approval was given, the agreement was signed by each member of the Exchange and by the Secretary-Treasurer and Business Agent for Local 449 (R. 17, 35).

In accordance with the then agreement Local 449, 60 days prior to the expiration date, gave notice of a desire to change the agreement. Negotiations for a new agreement began some time in March 1953 between the Exchange, acting on behalf of its members, and Local 449, acting on behalf of its member truck drivers. The negotiations continued off and on until May the 26th of 1953 at which time the truck drivers for Frontier Linen Supply Co., a member of the Exchange, went on strike, and established a picket line that day at Frontier. That same night, May the 26th, the Exchange and Local 449 had a meeting and during that meeting and at one or two subsequent meetings the non-struck employers told the representatives of Local 449 that their employees were laid

[1] The City of Buffalo is located in Erie County, Niagara Falls in Niagara County and Dunkirk in Chautauqua County of the State of New York.

off because of the strike at Frontier, and that if Local 449 would withdraw its picket line and cease the strike at Frontier, they would permit their employees to return to work (R. 18, 26). On May the 27th, the seven non-struck members of the Exchange locked out their employees.

It was stipulated that:

> "The employees referred to in Paragraph VIII of the Complaint were laid off for the reason that their bargaining representative, Local 449, had engaged in a strike on May 26th 1953, at the Frontier Linen Supply, Inc., Buffalo, New York, also a member of the Linen and Credit Exchange, the bargaining representative for all of its employer members" (R. 16).

B. The Trial Examiner's Findings and Report

The trial examiner, based on the facts, concluded that the non-struck employers had engaged in unfair labor practices proscribed by Section 8(a)(1) and (3) of the Act. He found:

> "Respondent's (the non-struck employers) conduct was unquestionably unlawful, since it constituted reprisal against the employees because the union, as their bargaining representative, had engaged in a lawful strike against Frontier[2] * * *[t]here was no showing that there were economic considerations which justified the lockout, and none that the Respondent's motive was in fact the protection of their economic interests. Cf. *Betts-Cadillac-Olds, Inc.*, 96 NLRB 269; *International Shoe Company*, 93 NLRB 159; *Duluth Bottling Association* 48 NLRB 1335".

C. Board's Conclusion and Order

The Board, upon the facts decided, with member Murdock dissenting, "in the circumstances we think the more reasonable inference is that, although not specifically an-

[2] The finding as to the lawfulness of the strike at Frontier was adopted by both the Board and Court of Appeals.

nounced by the Union, the strike against the one employer necessarily carried with it an implicit threat of future strike against any or all of the other members of the Association for the Union's action represents a familiar technique of exerting pressure to atomize the employer solidarity which is the fundamental aim of the multi-employer relationship * * *. Therefore, and in the absence of any independent, we find that the action in shutting their plants until termination of the strike at Frontier was defensive and privileged in nature, rather than retaliatory and unlawful" (R. 36).

The majority of the Board said that it was not establishing the premise "that the employer lockout is the corollary of the employee's statutory right to strike", acknowledging, however, that the Ninth Circuit Court of Appeals had stated that such was the law in *Leonard, et al. d/b/a Davis Furniture Co. et al. v. NLRB*, 205 F 2d 355 (C. A. 9); (R. 36).

The majority of the Board then went on to state that it was merely affirming the legal concept enunciated in *Davis Furniture:*

> "* * * a strike by employees against one employer-member of a multi-employer bargaining unit constitutes a threat of strike action against the other employers, which threat, *per se* constitutes the type of economic or operative problem at the plants of the non-struck employers which legally justifies their resort to a temporary lockout of employees" (R. 37).

At the same time the majority noted that in Davis Furniture it was stated, "* * * the whipsawing threatened the loss of customers and a cessation of the (employer's) market" (R. 37).

D. The Decision Below

The Court below sustained the findings of fact and agreed that under the circumstances and from the strike at Frontier the Board "reasonably inferred * * * a threat" of strike against the non-struck employer's (R. 44).

The Court then came to the heart of the case, "i.e., whether the threat of a strike legalized the lockouts by those employers against whom no strike had been called" (R. 44).

The Court proceeded to note that Section 7 of the Act guarantees employees the right to engage in "concerted activities" for "their mutual aid or protection", and that the right to strike and to support a strike constitutes "concerted activity" protected by statute (citing cases). It then observed that: "Interference with this right by the employer constitutes an unfair labor practice under 8(a)(1) of the Act, and a lockout prompted by a purpose to defeat employee organization or otherwise protected concerted activities is violative of the Act (citing cases). Such a lockout would also violate Section 8(a)(3) of the Act (citing cases) (R. 44-45).

Continuing the inquiry by steps to the heart of the case, the Court noted that "the Board, in its brief, concedes[2] as it must the basic principle that an employer

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[2] In view of the contradictory statement contained at page 15 in the Board's petition for *certiorari* fairness compels us to cite from page 8 of the Board's brief in the Second Circuit in this case—viz—.

"On the other hand, it is equally clear that a lockout prompted, not by such business considerations, but by a purpose to defeat employee organization or other protected concerted activities, is violative of the act (citing cases)".

And the Board further stated at page 9 of that same brief:

"* * * the Board has held (referring to cases cited in union's brief that the ordinary economic hardship occasioned by a strike does not privilege an employee to counter a strike threat with an anticipatory lockout".

Whether the Board contemplated the foregoing as a concession or not, the principle obtains with or without concession. See e.g. *American Brake Shoe*, 116 NLRB 107.

who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice" (R. 45).

Noting those cases (without approval or disapproval) where the Board had found justification for the anticipatory lockout, it then addressed itself to the fundamental question (R. 45-46) i.e., whether the mere threat of strike (deemed created) was justified merely because the struck and non-struck employers had theretofore, bargained as a group?

The Court answered the question in the negative (R. 47). The Court of Appeals for the Second Circuit correctly observed that the threat of strike deemed created by the Board placed the non-struck employers in no different position than the single employer threatened with a strike (R. 47). The Court distinguished the *Davis* case where the Ninth Circuit adopted the presumption that the non-struck employers were too weak economically to stand alone, from the instant case—"For there is no proof here, and no finding, that any of the employers who locked out was thus economically weak. On the contrary, according to the stipulated facts, the sole reason for the lockouts was the strike against a single member of the association and a desire to end that strike" (R. 47). The Court concluded by holding (R. 52):

> "The arguments against legalizing lockouts, merely because a multi-employer unit is involved were set out by the Board itself in the *Morand* case, 91 NLRB 409, 412-415 * * *"

The Court below further reasoned:

> "Multi-employer bargaining has never received the express sanction of Congress. It would stretch the usual canons of interpretation unduly far to conclude that, in enacting the Taft-Hartley Act, Congress gave

legislative approval to all previous Board rulings concerning such bargaining. Even if we assume that it did, still the Board, at that time had not gone to the extreme lengths to which it now seeks to go in order to maintain the 'stability of the employer unit'. We think Congress must have intended that such a radical innovation be left open for consideration by the joint committee it set up under Section 402 of the Act to study among other things, 'the methods and procedures for best carrying out the collective bargaining process, with special attention to the effect of industry wide or regional bargaining upon the national economy' " (R. 53-55).

Summary of Argument

In most summary form, our argument is that the non-struck employers by admissions in their answer and by stipulation establish a transgression of the plain meaning of the language of Section 8 (a)(1) and (3) of the Act and that there is no basis in fact or in law for immunizing such conduct.

Once it appears, as it does here, that an employer has penalized employees, and thus discriminated against them, because the employees exercised a statutory right, a *prima facie* violation of the Act has been made out.

Under well understood principles of law, the employer must come forward with an explanation for this violation if it is to avoid the sanctions of the law.

A question of law would then arise as to whether the explanation, assuming it to be worthy of credence, is sufficient reason to justify the violation of the Act.

In the instant case no question is or has been raised that the strike at Frontier Linen is concerted activity protected by Sections 7 and 13 of the Act.

In the instant case no question is or has been raised that even if the employees at the non-struck employers supported such strike, that this support is concerted activity protected by Sections 7 and 13 of the Act.

In the instant case no question is or can be raised that the employees of the non-struck employers were laid off because of the exercise of their rights guaranteed by Section 7 and 13. It was expressly stipulated:

> "the employees (of the non-struck employers) were laid off for the reason that their bargaining representative, Local 449, had engaged in a strike on May 26, 1953, at the Frontier Linen Supply Co., Inc., Buffalo, New York, also a member of the Linen and Credit Exchange, the bargaining representative for all of its employer members (R. 16-17)."

Clearly then, *per se* violations of the provisions of Section 8 (a)(1) and (3) of the Act were made out. The Trial Examiner, Member Murdock, and the Court below held, that the non-struck members of the Exchange, at the very least, should have come forward with some explanation which they conceived to be justification for the violations of the Act. The record is barren of explanation.

The majority of the Board held that the non-struck employers were privileged to lay off their employees to preserve *the solidarity of the multi-employer group.*

The Board decided that "the threat of strike[4] action * * * *per se*, constitutes the type of economic or operative

[4] The Board's inference that the strike at Frontier carried with it the threat to strike the non-struck corporations overlooks some facts of life. It assumes that the Union has the desire, resources and more importantly the authorization of the truck driver employees at a given employer to carry out such strategy. Furthermore, there is no finding that such strikes were imminent and the non-struck employers didn't even bother to inquire (R. 26). cf. American Brake Shoe, 116 NLRB No. 107. In any event we fail to see how the non-struck employers were in any different position after the strike at Frontier, than before.

problem at the plants of the non-struck employers which legally justifies their resort to a temporary lockout of employees (R. 37).

There is no statutory authority for the proposition that, the threat of strike *per se* activates an employer's right to lay off his employees. If such should be made the law, the only economic weapon of the employees, the right to strike, is rendered useless before it is applied.

There is no basis in the record of this case to support the conclusion that the strike at Frontier created an economic or operative problem at the plants of the non-struck employers. The non-struck employers never made any such claim. Indeed, the only problem reasonably to be anticipated would be an increased volume of business by reason of the strike at its competitor, Frontier.

The Board, however, by acquiescing to this reasoning of the Ninth Circuit, did not say an economic or operative problem was *created* by the implied threat of strike, but held that the implied threat of strike *constituted* an economic or operative problem sufficient in itself to justify a violation of the plain words of the statute.

We maintained and the Second Circuit Court of Appeals agreed, that the Board by adopting this presumption exceeded its legislative mandate by making new law to be applicable to multi-employer groups whether certified or not.

The Board's decision would have given to employers the right to lockout upon an implied threat of strike and add to the arsenal of multi-employers groups, the potent weapon of secondary lockout. We think the Board was correct when it held in the *Morand* case, 91 NLRB 409, at 412:

"To hold that employees in a multi-employer unit who remain at work may be treated as strikers, solely because of a strike by other employees, would involve the introduction of a new concept in labor relations—i.e., the vicarious or constructive strike. We know of no legislative or other warrant for introducing such a concept".

We think the Board was likewise correct when it held in *Morand ibid* at 416, that the:

"Failure to pass proposed legislation banning industry-wide or regional bargaining does not in our opinion reflect a congressional intent to foster and promote such bargaining in preference to individual employer bargaining, but only an intent to leave undisturbed the *status quo* which made such a practice permissible."

The Board in the instant case by succumbing to the reasoning of the Ninth Circuit in *Davis Furniture* not only would have destroyed the right to strike with a consequent increase in the disproportion in bargaining position of employees and the employers doing business in the corporate form, but would increase the area of economic conflict with consequent deprivation of services and commodities to the public. The Act was purportedly designed to prevent or minimize all of these consequences.

The Court below having found no reason to distinguish this case from that of the individual employer faced with the threat of strike (R. 47) held that in the absence of economic justification and none appears here (R. 55) that the Board by legalizing the lockout merely because a multi-employer was involved exceeded its legislative mandate (R. 55).

"We feel the Board's action in restricting employees in the exercise of rights which Congress has expressly

protected, merely to effectuate a policy as to which Congress, as yet, expressed no clear opinion, constitutes an abuse of the Board's legitimate authority under the Act, and a usurpation of the power of Congress" (R. 55).

We submit that the decision rendered below, by the United States Court of Appeals for the Second Circuit is correct.

ARGUMENT

POINTS

I

The right to strike and to support a strike are concerted activities protected by Section 7 of the Act and a lay off of employees because of their participation in such activities is in violation of Section 8 (a)(1) and (3) of the Act.

Section 7 of the Act guarantees employees the right to engage in self-organization, collective bargaining and "other concerted activities" for their "mutual aid or protection".

The right to engage in concerted activity for mutual aid or protection embraces "the right to strike—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands" (N. L. R. B. vs. Fansteel Metallurgical Corp., 300 U. S. 240, 256).

This Court has twice recently reaffirmed this rule. "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *U. A. W. v. O'Brien*, 339 U. S. 454, 456-457; *Amalgamated Association v. WERB*, 340 U. S. 383.

Section 8 (a) (1) of the Act bars infringement by an employer on concerted activity and Section 8 (a) (3) of the Act bars discouragement of membership in a labor organization by discriminatory alteration of employment for union activity. Any alteration of employment status is discriminatory where it is in "punishment for, or discouragement of, such activity, as the Act declares permissible." Employees are safeguarded in their exercise of the right to strike by those sections of the Act which prohibit an employer from impairing the tenure or terms of employment in retaliation for their actual or anticipated recourse to strike action.[5]

It is well established law "that strike activity actual or threatened is concerted activity, and concerted activity does not cease to be protected merely because it is or may be effective, or because it subjects the employer to economic hardship". *N.L.R.B. v. National Broadcasting Co., Inc.*, 150 F. 2d 895, 900 (C. A. 2). It has been consistently held that neither a strike nor the threat of strike (*National Liquors Co. v. N.L.R.B.*, 309 U.S. 350); nor fear of economic pressure (*N.L.R.B. v. Fred P. Weisman Co.*, 170 F. 2d 953 (C. A. 6); *American Car and Foundry Co.*, 161 F. 2d 953 (C. A. 6); nor economic hardship (*Lakeshore Electric Mfg. Co.*, 67 N.L.R.B. 804) justifies discriminatory action against employees. The employees exercise of concerted "activities may be highly prejudicial to (the)

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[5] *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345, 347-348 (refusal to reinstate leaders of an economic strike); *N.L.R.B. v. Remington Rand, Inc.*, 130 F. 2d 919, 928 (C. A. 2) ("Respondent, by its immediate discharge of the strikers and attempted abnegation of the employment relationship was guilty of an unfair labor practice"); *Firth Carpet Co., v. N.L.R.B.*, 129 F. 2d 633, 635 (C. A. 2) (refusal to reinstate employees because they engaged in a strike); *N.L.R.B. v. Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 663 (C. A. 2) (discharge of employees for striking). *N.L.R.B. v. Wallick & Schwaler Co.*, 198 F. 2d 477 (C. A. 3); *N.L.R.B. v. Somerset Classics*, 693 F. 2d 613 (C. A. 2) cert. den., 344 U. S. 816; *Olin Industries v. N.L.R.B.*, 191 F. 2d 613 (C. A. 5), cert. den., 343 U. S. 919.

employer; * * *but the statute forbids him by discharge to rid himself of those who lay burdens upon him. Congress has weighed the conflict of his interest with theirs, and has *pro tanto* shorn him of his powers". Chief Judge Learned Hand, in *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., Inc.*, (30 F. 2d 503, 506 (C. A. 2)).

The Board offered this principle when it held in *Marand Bros. Beverage Co.*, 99 NLRB 1448 (on remand) at 1462-1463:

> "Neither Section 8 (a) (1) nor Section 8 (a) (3) of the Act draws any distinction between a discharge and a temporary layoff. The broad language utilized proscribes both permanent and temporary terminations of the employment relationship when directed against protected concerted activity. We are not free to cut down on the broad proscriptions of Section 8 (a) (1) and 8 (a) (3), so as to sanction lockouts, which are designed to break a bargaining, impasse by bringing economic pressure on employees who have engaged in collective bargaining, unless other sections of the statute clearly require it. We find no such requirement".

It being established that the support of the strike at Frontier Linen by the employees of the non-struck employers was "concerted activity" for their "mutual aid or protection"[8] and it being admitted by express stipulation that these employees were laid off by reason of their implied support of the strike at Frontier and were to remain laid off so long as the strike and picket line continued, it follows that this record contains clear and in-

[8] No charge was made that the employee's activity was anything other than protected concerted activity. The trial Examiner so found (R. 28) and this finding was not disturbed by either the Board or the Second Circuit. This issue seems to have been settled by the decision in the *Morand* case, 91 N.L.R.B. 409; 190 F. 2d 576 (C. A. 7). This point was not raised in *Davis Furniture Co.*, 94 N.L.R.B. 279; 197 F. 2d 435 (C. A. 9); 100 N.L.R.B. 1016 (on remand) 207 F. 2d 355 (C. A. 9).

deed, classic illustrations of violations of the plan language of Section 8 (a) (1) and (3) of the Act.

The Board chooses to ignore the plain language of the statute and to talk in terms of protecting "the solidarity" of an unincorporated association composed of fictional entities known as corporations. The Board postulates, by stating metaphorically, the answer to the question raised by the facts of litigation.

It may be urged that by hiring replacements during a strike an employer diminishes the effectiveness of a strike and that a layoff of employees who belong to the striking union falls into the same category.

Though the result may be the same, there is a critical difference between the means.

The employers right to hire replacements is part of its right to operate a plant, and it may be said to square with the Acts' purpose to eliminate or minimize obstructions to commerce. The continuation of operations is the employer's counterpoise to the striker's attempt to curtail production.

There is a fundamental difference in character between the continuation of production and curtailment, and it is the particular character of the curtailment under the facts in this record which is the issue before this Court.

II

There is no evidence in the record or reason in law to support the conclusion the layoff was justified.

The non-struck members of the Exchange offered no factual defense for the lockout but rested on some unexpressed premise which they derived from the language used

by the Seventh Circuit in the *Morand* case[7] and the Ninth Circuit in the *Davis* case[8].

The non-struck members never claimed or attempted to support the claim that they could not operate under the threat of strike. Their position was no different after the strike at Frontier then before. There was always the implied threat of strike. Indeed, their fears were somewhat allayed since they could assume that if there was to be any strike at their plant it would not occur until after the conclusion of the strike at Frontier. As a matter of fact, they didn't bother to ask and made no claim that they couldn't operate. The Trial Examiner stated it very succinctly (R. 26):

> "• • • there was no showing that there were any economic considerations which justified the lockout, and none that the (non-struck employer's) motive was in fact the protection of their economic interests".

Board Member Murdock in his dissenting opinion herein restated the cases wherein the phrase "economic or operative problem" was applied and from which the principle of "justification" stems (R. 37 at 39).

> "It is true that the Board and Courts have held that certain lockouts are permissible where the record is clear that it is not economically feasible for the Respondent to keep its doors open under the threat of an immediate strike. Thus, in Betts-Cadillac Olds, Inc., 96 NLRB 268, a group of automobile dealers were fearful that if they accepted automobile repair jobs they could not, under threat of strike, assure their customers that the work would be done expeditiously.
>
> The Board affirmed the Trial Examiner's finding that the lockout, in anticipation of the strike was justified. Similarly, a lockout to prevent spoilage of materials, (Duluth Bottling Association, 48 N.L.R.B. 1335) or

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[7] *Morand Bros. Beverage Co.*, 190 F. 2d 576; 204 F. 2d 529.
[8] *Leonard, et al d/b/a Davis Furniture Co.*, 197 F. 2d 435; 205 F. 2d 355.

one induced by the operative difficulties of running a plant where the union struck one of three integrated departments (International Shoe Company, 93 N.L.R.B. 907) has been held lawful".

The decision in this case does not necessitate a holding that the resumé of Member Murdock is all inclusive or even correct,[9] nor do we see any necessity for setting the precise limits of the forbearance which the Act requires of an employer faced with an implied or actual threat of strike. All that is necessary to decision is that there is no explanation which can be extracted from the record in this case to justify the plain transgressions of the prohibitions contained in Section 8(a)(1) and (3).

Stripped of such verbal abstractions as "solidarity", "unity", "motive", "economic or operative problems" which obscure or evade the real issue, the Board's argument rests on the presumption, wholly without claim or support in the record, that the employers were economically weak.

The Board's argument posits all multi-employer groups are formed because the individual corporations are economically weaker than a union composed of their respective employees:

The Linen and Credit Exchange is a multi-employer group.

Therefore, the individual corporate members are weaker than the union.

The Board chooses to overlook the facts of this record.

The Board itself refused prior to this case to establish as a principle that economic weakness creates legal im-

[9] Nor do we concede the correctness of the principle of such cases.

munity (*Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 at 412).

> "The Board has held, with judicial approval, that an employer's economic interest in preventing a strike does not justify him in engaging in conduct of the type proscribed by the Act[10]."
>
> The fact that the expected strike may be so timed or so directed as to place severe economic pressure on the employer does not, in our judgment, remove the strikers from the protection of the Act. Strike activity, actual or threatened is concerted activity and concerted does not cease to be protected merely because it is, or may be effective, or because it subjects the employer to economic hardship[11]."
>
> • • •
>
> "In this case (Morand), the effect of granting immunity to the discriminatory lockout by 34 employers, in reprisal against the strike against a 35th employer, would be to multiply the obstruction to commerce. It would set a sweeping precedent for the conversion of any single employer's dispute into an association—wide or industry wide dispute. An isolated skirmish would become a civil war".
>
> • • •
>
> "The logical corollary of the (non-struck employer's) position is, therefore, that a union seeking to negotiate a contract with a group of employers, however large, must strike all or none. If it strikes less than all, its members will be deprived of the protection of the Act; if it strikes all, they will be protected. We cannot give such an incongrous construction to an Act designed to minimize industrial strife".

If the weakness of the employer is to be the parameter of the limitations to be imposed on employees by reason of

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[10] *N.L.R.B. v. Star Publishing Co.*, 97 F. 2d 465, 470 (discriminatory transfers); *Goodyear Tire & Rubber Co. of Alabama*, 21 N.L.R.B. 306, 371 (discriminatory discharges); *Ward Baking Co.*, 8 N.L.R.B. 558, 567; *Humble Oil & Refining Co.*, 16 N.L.R.B. 112, 113-120. cf. *Lengel-Fencil Co.*, 8 NLRB 988 which is distinguishable on the facts.

[11] *N.L.R.B. v. National Broadcasting Co., Inc.*, 150 F. 2d 895, 900 (C. A. 2, 1945) and cases there cited.

their exercise of statutory rights, then fairness demands that an inquiry be had into the relative economic strength of the combatants and the non-combatants.

The legislative assumption has been to the contrary. The Congress adopted the economically self-evident presumption that it was the employees who were weak and by successive legislation, culminating in the enactment of the Wagner Act accomplished an economic balance. The Labor Management Relations Act of 1947 corrected what it considered to be some excesses on the part of the employees.

Congress, in the amendments to the Act in 1947 retained the original declaration of its purpose to eliminate the inequality of bargaining power arising from the superior economic strength of employers. Congress added an additional purpose—the elimination of "certain practices by some labor organizations". The overall purpose was the minimization of industrial strife.

The technique adopted to accomplish these purposes was to amend the Act, and in Section 8 (b) thereof, certain practices of labor organizations were proscribed and certain obligations were added. Conduct of employers which theretofore had been deemed inimacable to peaceful settlements of disputes was continued under the ban of Section 8(a). Section 8(a)(1) and (3) were continued in force. In addition, the right of free speech was expressly guaranteed to employers.

Thus, we can observe in summary, that Congress has imposed sanctions on the means employed in a strike (*N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 256) and the purpose of a strike (*American News Co., Inc.*, 55 N.L.R.B. 1302); it has in the interest of the public wel-

fare, established certain conditions which must be fulfilled before any strike over contract modification or termination may be had (Sec. 8(d) of the Act) and has outlawed strikes where the method or the objective was deemed contrary to the public interest (Sec. 8(b) (4) of the Act). Aside from these sanctions and limitations the right to strike was expressly preserved and Congress protected such right against other means or sources of limitation by Section 13 of the Act.

The Board then, in excess of their mandate, extended the technique based on a tacit presumption of the relative weakness of *employers* merely because of the form of the bargaining group, to defeat the express purpose of the Act. There is nothing in the Act or its legislative history to support this anomoly. The Board in fostering the sympathetic lockout ignores the plain language of Sections 7 and 13 and Section 8(a)(1) and (3) of the Act.

III

Lockouts are not the employer's equivalent of the employee's right to strike.

The Board noted in its brief (Petitioner's Brief page 12; Footnote 7) that it reserved decision on the question of whether lockouts are the employer's equivalent of the union's right to strike.

The Board further notes its decision in *American Brake Shoe Co.*, 116 N.L.R.B., No. 107 (August 28, 1956), 38 LRRM 1330, where the Board held at 1335:

> "The Act guarantees to employees the right to engage in strike to secure, among other things, better wages, hours, and working conditions. Strike action is thus a legitimate means of employees to exert economic

pressure upon their employer. Its effectiveness as such a weapon depends largely, if not entirely upon the extent to which a strike disrupts the employer's normal business and business relationships. We believe that Congress, in guaranteeing to employees the right to strike, did not intend to grant them a hollow right by at the same time, allowing an employer to avoid the normal consequences of a strike by anticipatory action which discriminates against employees because of their union activities or otherwise interferes with their rights under the Act. *If such anticipatory conduct were sanctioned the employer would be immunized from effective strike action, and the employees right to strike would be rendered virtually meaningless".* (Emphasis supplied.)

In addition to the foregoing the Board in its decisions in the *Morand* case, 91 N.L.R.B. 409, and particularly in that case on remand 99 N.L.R.B. 1448 at 1461-1466, and in the *Davis* case on remand 100 N.L.R.B. 1016 at 1018-1021, fully explicated its views and the reasons for rejecting any such facile equation of economic remedies.

We may be accused, then, of assailing a conceded fortress by now raising this point for argument. We submit our argument only because it seems to be the main theme of the briefs *amici* accompanied with overtones of the Board's "were too weak".

The argument[12] stemming from the linking of "strikes and lockouts" has the merit at least of relying (erroneously the parties agree) on the words of the statute, whereas the "we're too weak" argument is without claim or support in the record and in the face of the uncontradicted finding by the Trial Examiner—(R. 26).

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[12] The further argument that the Union continued to bargain with the Exchange is somewhat misleading in that the Board is well aware that whatever form the bargaining took, the struck and the non-struck corporations could designate their bargaining representative free from any demands in that respect, from Union or its agents 8(b)(1)(B). The Board itself fully discussed a parallel situation in the *Morand case*, 91 NLRB 409.

The Court below rejected the reasoning of the Ninth Circuit that the linking of the term "strike and lockout" supports the conclusion that Congress recognizes the two as correlative economic powers (R. 47). The Second Circuit held (ibid):

> "But we think the Board, in *Davis Furniture Company*, 100 NLRB 1015, 1019 correctly noted that, in each instance where those two words are linked, a particular strike activity is proscribed as unlawful, and the specific inclusion of a 'lockout' in this context may well have stemmed 'from a desire to emphasize even-handed justice where union activity was being restricted * * *'. We find nothing in the Act which equates lawful strikes and lockouts. On the contrary, only the right to strike is expressly reserved by Congress in Section 13 of the Act * * *".

The statement made by Senator Taft[13] which the Ninth Circuit in the *Davis* case considered significant 205 F. 2d 335, it must be noted, was made in the context of dispensing "even handed" justice under the Ball amendment which made it an unfair labor practice for a labor organization to interfere with employee rights guaranteed under Section 7 of the Act. Mr. Taft stated that "the amendment is founded on what I consider to be the basic theory of the entire bill, that is, an attempt to create equality between the employer and employee". It is obvious from the colloquy between Senator Taft and Senator Morse that neither one of them took the argument too seriously[14].

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[13] "Men have come to me and said, regarding the question of an injunction for 60 days against a nation-wide strike 'you enjoin the strike, but you do not do anything to the employers'. The opposite is the fact. Anyone who read the section will see that there is a right to enjoin a *lockout* just as well as there is a right to enjoin a strike. * * *" 2 Legislative History of the Labor Management Relations Act 1206.

[14] In an article entitled "The Legislative Process in Canada", reported at Volume 41 of the American Bar Association Journal 169, Mr. Elmer D. Driedger, Parliamentary Counsel, Department of Justice, Canada, made an interesting comment on the use of legislative history at page 171:

(Footnote continued on following page.)

For as Senator Morse remarked:

> "I simply want to say that I think it would be a very interesting case if a Court undertook to compel an employer who says 'I cannot pay the wages' to continue to operate his plant, even though he does not have the money with which to pay the wages. I think there would be some very interesting questions raised with regard to due process of law under such an injunction". 2 Leg. Hist. 1206.

The Board in its decision in the *Morand* case, 99 N.L.R.B. 1448 (on remand) gave a full and convincing analysis of the legislative intent in linking "strikes and lockouts".

After noting that in each case where the words "strike or lockouts" were linked it was when the activity was proscribed the Board held "there would seem to be no more reason for holding that that phrase immunizes all lockouts or particular types of lockouts, then there is for holding that it immunizes all strikes, or particular types of strikes. Moreover, the mere fact that there is an express proscription of one type anti-union conduct—i.e. lockouts in one section of the Act—is not a persuasive reason for finding that such conduct is exempt from the blanket pro-

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(Footnote continued from preceding page.)

"A member can discuss the bill only on his interpretation of it, which may or may not be correct. The members of the Cabinet, on the other hand, are concerned with the immediate problem at hand, namely getting the bill through the House and securing its popular acceptance, than with setting future legal interpretations of the statute on facts that have not yet arisen, and the private member, either in the House or in committee assails the measure for what it says, and not the Ministry says about it. And when Parliament adopts the measure, the written words therein become the law, and not the conversations that took place beforehand or the political bricks or bouquets that were showered on the Bill when it ran the parliamentary gauntlet".

It is not our purpose to discourage recourse to the legislative history but we cannot extract from Senator Taft's remarks on lockouts any other meaning than that he was there attempting to show that the Ball amendment was equitable. Indeed, as we read the colloquy, it was not intended to be a persuasive commentary on even the emergency dispute section. See also, in 2 Legislative History of the Labor Management Relations Act of 1947 at page 1594, the colloquy between Senators Taft and Pepper for an interesting explanation of the legislative process.

scriptions of Section 8 (a) (1) and (3) of the Act. There are many instances of conduct which violates more than one provision of the Act". 99 NLRB 1448 at 1463.

The Board then explained the clear intent of the Congress:

> "It seems clear to us from a reading of Section 8(d)(4) that the sole concern of Congress in enacting that provision and the entire thrust, thereof was to discourage resort of self-help by *both* employees and unions during that period. It is understandable that, in seeking to underscore this purpose, Congress would specifically proscribe the most relevant forms of self-help namely, strikes and lockouts. It follows from this view that Congress was not concerned at this point with the legal status of strikes and lockouts under other provisions of the Act but was solely desirous of insuring that, *whatever that status might be,* no strikes or lockouts would occur during the sixty day period".

By banning "strikes or lockouts" during the 60 day period, Congress avoided the task of deciding whether the stoppage was one or the other. Mr. K. G. J. C. Knowles in his book "A Study in Industrial Conflict" (Philoso- in his book "A Study in Industrial Conflict" (Philosophical Library, New York 1952) at page 299 explained this

> "*Difficulty of distinguishing strikes from lockouts.* At first sight it would seem useful to have a breakdown of disputes into strikes and lockouts. In practice, however, as was found by the United Kingdom Alliance of Organized Trades as far back as 1866 (this organization was formed to support men locked out by their employers, but could never decide what constituted a lockout) no precise distinction can be made;

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(13) See also "Organized Labor" by Mills and Montgomery (1945) at 691 footnote 23; "Trade Union Wage Policy" by A. M. Ross (Berkeley, U. of California Press, 1948) at 106-107 "To levy blame for a stoppage requires a more sophisticate analysis than one which merely identifies the party making the first move". Labor Economics & Labor Relations 2 ed. (Prentice Hall) (1954) at 329; Collective Bargaining by Chamberlain (McGraw Hill 1951) at 228. This was Senator Morse's point. See 2 Leg. Hist. of the Act at page 958.

for the distinction is as difficult and subjective as that between aggressive and defensive war. * * * But since strikes may be provoked by employers and lockouts by workers, 'the question from which side the declaration is finally made is rather immaterial. Sometimes, indeed, it is impossible to say even whether a dispute should be formally called a strike or a lockout', (Florence Peterson, Strikes in the United States 1880—1936 in (U. S. Bureau of Labor Statistics Bulletin No. 651 at pages 3-4 gives a number of examples to illustrate this difficulty)) some disputes are both, successively or simultaneously.

The distinction between strike and lockout, then, can provide no indication of where the 'war guilt' lies, and is of value only as showing what *forms* disputes appear to take at different times".

But the arguments in the briefs of the *amici* overlook or disguise the fact that the *sympathetic* lockout is the corollary not of a strike, but of a secondary boycott[16]. For in the sympathetic lockout, pressure is brought to bear upon third persons—their own non striking workers who are not immediately involved in the dispute—for the purpose of preventing them from lending their moral and economic support to the striking workers. Such an equation of weapons can hardly be squared with the avowed Congressional purpose to minimize and localize obstructions to commerce.

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[16] See Vol. 10 of Studies in History and Economics and Public Law—Columbus University (1898) entitled "Sympathetic Strikes and Sympathetic Lockouts". The Study shows, at page 51: "The sympathetic lockout proves thus to be as generally used as the sympathetic strike. It developed much earlier than the sympathetic strike, because the necessity which called it into existence was itself an early development and because the higher intellectual position of employers made them more willing to discount a present injury in order to gain a future good. They could understand it fifty years ago the employers could not". The author then demonstrates how and why the Unions developed the "general Strike" weapon in England. It is of some interest to note that the first sympathetic lockout occurred in London in 1851.

IV

There is no congressional policy favoring multi-employer bargaining over single-employer bargaining.

It has been seen and, indeed, agreed upon (American Brake Shoe, 116 NLRB No. 107 (August 28, 1956), 38 LRRM 1330) that in the case of the single employer the mere threat of strike does not by itself constitute the type of economic or operative problem as will justify the resort to the lockout.

Indeed, it will be agreed that a single employer operating many plants could not shut them all down merely because of a strike at one.

The Board, however, while agreeing that the conduct of the non-struck employers would be illegal in the absence of group bargaining is made legal by joining the group.

The Court below underscored the illogic of the Board's position by the following example (R. 53).

> "The difficulty with which a union would be faced if it were placed in the dilemma set forth by the Board can easily be foreseen. For example, if a union representing automobile workers had once bargained collectively with a group representing all the automobile manufacturers, a subsequent strike against, say, the Ford Company would justify General Motors in locking out its employees, regardless of the patent fact that the anticipation of a strike against General Motors would cause it no exceptional economic hardship.
>
> Thus, if we were to accept the Board's reasoning in the instant case, in any case where there is a history of multi-employer bargaining, of the union wishes to call a strike, it must wait until it can afford to strike all the employees in the unit; for if it struck only one,

> the non-struck members of the association could lock out their employees".[17]

To establish such a situation is either to create a special class of employers or to hold that "otherwise illegal action is made legal by concert". *U. A. W. v. Wisconsin Board*, 336 U. S. 245, 258.

There is nothing in the Act or its legislative history to support such an anomoly.

The Court below (R. 54 fn. 13) gives a list of citations to the legislative history relating to multi-employer bargaining and observed that a review of that history "discloses sharp disagreement over the disirability of multi-employer bargaining".

But, said the Court, even if it be assumed that the Congress gave legislative approval to all the previous Board ruling concerning such bargaining, "still the Board at that time had not gone to the extreme lengths to which it now seeks to go in order to maintain the 'stability of the multi-employer unit'" (R. 54).

The Court below refused to overlook the fact that Congress, far from placing an imprimatur on this type of bargaining, made it abundantly clear that it was taking the matter under investigation, by setting up a joint committee under Section 402 of the Act, to study among other things,

> "the methods and procedures for best carrying out the collective bargaining process, *with special attention to the effect of industry-wide or regional bargaining upon the national economy*".

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[17] The Board's position, said the Court below, (R. 48-49) is that once a union agrees to group bargaining—"it becomes obligated to continue bargaining exclusively with the employer association, at least to the extent that, if it strikes against one member of the association, lockouts by the other members become lawful although the lockouts would otherwise be unlawful * * *".

We fail to see how even the most devoted partisan of multi-employer bargaining can seriously argue that Congress desired to favor multi-employer groups over the individual employer by giving to members of a group the right of sympathetic lockout to preserve the solidarity of the group.

The defenders of multi-employer bargaining, particularly Senators Morse and Ives, took the position that this form of collective bargaining had become customary in certain industries in particular regions and there was some evidence to show that such bargaining had a stabilizing and otherwise salutory effect. They advocated caution, and it would seem that the advice was accepted by Congress in view of the investigative approach ultimately adopted and now underway. The most that can be gleaned from the legislative history for multi-employer bargaining is that it can be tolerated. There is not a shread of evidence that the Congress even considered the possibility of permitting employers the potent weapon of sympathetic lockout to preserve the solidarity of the group.

The Board throughout its brief proceeds on a continuous assumption of a set of circumstances—bargaining inequality-full employment—etc. This series of assumptions based on observations of situations by writers without even a showing that the situations are apposite—is absolutely refuted by the testimony. There is neither claim nor proof that any of these circumstances exist.

The Board in its brief (Bd. Br. pg. 25) quotes from pamphlet written by the author of one of the briefs *amici* (Mr. Bahrs) and then observes very candidly in a footnote (idem fn. 30) that the situation described in the

text would work quite to the opposite in a depressive market.

We respectfully submit that the Board was not delegated the power to work out an economic balance with one eye on the Act and the other on the Wall Street Journal.

The Act, by requiring employees to bargain in good faith (Sec. 8(b)(3)), by establishing prerequisites before any strike or termination may occur (Sec. 8(d)) and by Section 301 of the Act making unions suable as an entity and liable as such for breach of collective agreements, has effectively limited the time in which an employer or a group of employers can be exposed to a strike.

Labor unions at considerable sacrifice to the individual members accumulate strike funds to relieve the economic hardship of a strike. It would be only fair and reasonable to limit secondary aid to a struck employer by others in the group to such a method for this would be more consonant with the basic purpose of the Act in confining the area of disputes to a given employer and his employees. Carpenter, in his work—"Employer's Associations and Collective Bargaining" suggests a number of palatable alternatives at page 214:

> "Where the association cannot divert the concentration of union forces away from the weakest spots in the line it must come to the defense of its members bearing the brunt of the attack. A member whose plant is closed by strike may be given various forms of economic support. Those who supply him may be asked to hold the materials, and his customers may be requested not to cancel orders. Or his competitors in the association may agree to take over his business on a temporary basis. They may accept his orders and handle his trade with the understanding that the business will be returned to him when the strike is over. Or the association may offer him direct

financial assistance. Recently a militant union in New York City sought to enforce its contract demands upon a well organized employers association in the restaurant industry by striking against two or three of the members at a time. But when the Union learned that the association had levied a special strike assessment upon all its members, it called off the strike and came to terms with the association".

But the lockout has a triple effect which increase to that extent its desirability:

1. It preserves the competitive position of the individual corporations.

2. It cuts off the wages of employees and disables them from supporting the strike at the plant of the struck member.

3. It discourages interest in the Union because employees are laid off because of their membership in the Union and even though they are willing to work or even voted against a strike at the plant of their own employer.

There is no gainsaying that the lockout, like the secondary boycott are effective economic weapons. Perhaps Congress may permit the use of both of them under certain conditions but the Board cannot.

The Board throughout its brief quotes and cites authorities to support the desirability of multi-employer bargaining. Perhaps they can persuade the Congress for Senator Ives stated[18], with regard to the investigation proposed under Section 402 of the Act:

"The hearings before the Senate Committee on Labor and Public Welfare, the discussions by the members of the committee among themselves, and the debate

[18] 93 Daily Cong. Rec. 479 at 4793—May 7, 1947; 2 Leg. Hist. 1283 at 1284.

now in progress on the floor of the Senate, all indicate that we do not possess a sufficient knowledge of the subject of industry-wide bargaining to enable us to adequately or satisfactorily to provide by statute at this time the remedies which ultimately must be found by which to correct the conditions which all of us recognize demand correction.

Because of this very situation in TITLE IV • • • of the bill itself there appears a special mandate to the committee • • • to study and investigate • • • the effects of industry-wide or regional bargaining upon the national economy.

• • •

I repeat, such provision in the bill itself is recognition of the fact that we have not yet found the answers to the question inherent in the problem of industry-wide bargaining".[19]

The thought may be ventured that a strong case can be made against multi-employer bargaining but that is not our purpose. We view multi-employer bargaining pragmatically without any overtones of the absolute.

No doubt Unions derive some benefit from multi-employer bargaining but protection against raiding isn't one of them. Since an employer can withdraw from the group at its whim even if there is a certification, we fail to see how the Union is protected. See cases reported in Commerce Clearing House—Labor Law Reports at paragraphs (54, 175) and (54, 187) published November 8, 1956.

Cyrus S. Ching in book "Review and Reflection"[20] covering a half-century of labor relations devotes a full chapter to the subject of "Industry Wide Bargaining" taking up one by one what he characterizes as its "pseudo-

[19] See also Sen. Taft 93 Daily Cong. Rec. 3955; 2 Leg. Hist. 1014.
[20] B. C. Forbes & Co. 1956—Chapt. 12.

advantages" and rather persuasively demonstrates that it is at best a mixed blessing.[21]

The arguments urged that if employers are denied the right of sympathetic lockout, the multi-employer bargaining will collapse did not have any persuasive effect on the Board prior to this case. Indeed, the picking off of a single member serves an excellent purpose, since it may be the recalcitrant, anti-union employer who has brought about the impasse in bargaining and is chosen for the Union attack.[22] And it has been demonstrated that a strike against one is in the public interest where multi-employer bargaining ceases to be satisfactory to both parties.[23]

There are strong and, we think, persuasive reasons against solving the multi-employer bargaining problem by permitting the use of the sympathetic lockout. Until such time, in any event, as Congress clearly resolves the problem which it has taken in hand, the National Labor Relations Board is in excess of its mandate in seeking to achieve what it conceives to be the future legislative course.

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[21] See also Wolman, *Industry Wide Bargaining*, 1 Labor Law Journal 167; 2 N. Y. U. Annual Conf. on Labor 20 (1949).
[22] See 53 Michigan Law Review 490, fn. 13.
[23] 3 Stanford Law Review 510.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

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APPENDIX

The relevant provisions of the National Labor Relations act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

Unfair Labor Practices

Sec. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: • • •

• • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

• • •

Limitations

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.